

NO. COA14-108

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2015

IN THE MATTER OF THE FORECLOSURE  
OF A DEED OF TRUST EXECUTED BY  
RALPH M. FOSTER AND SHYVONNE L.  
STEED-FOSTER DATED FEBRUARY 26, Durham County  
2010 AND RECORDED IN BOOK 6428 AT 12 SP 1061  
PAGE 134 IN THE DURHAM COUNTY  
PUBLIC REGISTRY, NORTH CAROLINA

Appeal by respondents from order entered 8 August 2013 by  
Judge Carl R. Fox in Durham County Superior Court. Heard in the  
Court of Appeals 7 May 2014.

*Womble, Carlyle, Sandridge & Rice, LLP, by Christopher W.  
Jones, for petitioner-appellee.*

*Ralph M. Foster and Shyvonne L. Steed-Foster, pro se,  
respondents-appellants.*

GEER, Judge.

Wells Fargo Bank, NA initiated foreclosure proceedings  
against respondents Ralph M. Foster and Shyvonne L. Steed-Foster.  
The clerk of superior court denied the foreclosure petition, and  
the superior court dismissed Wells Fargo's appeal of the clerk's  
order. The court did not, however, rule on respondents' motions  
for sanctions and permanent injunctive relief for fraud on the  
court. Respondents appealed the dismissal order to this Court,

but they never served a proposed record on appeal. The superior court granted Wells Fargo's motion to dismiss respondents' appeal. Respondents moved for relief under Rule 60 of the Rules of Civil Procedure from the order dismissing their appeal and for reconsideration of their motions for sanctions and permanent injunctive relief. The superior court denied the Rule 60 motion, and we affirm.

#### Facts

On 26 February 2010, respondents executed a promissory note in the amount of \$340,506.00 secured by a deed of trust on their real property. On 31 July 2012, the substitute trustee initiated a foreclosure proceeding at the request of Wells Fargo by filing a "NOTICE OF HEARING ON FORECLOSURE OF DEED OF TRUST." On 2 January 2013, after a hearing, the clerk of superior court entered an order dismissing the petition. Wells Fargo filed written notice of appeal from the clerk's order on 7 January 2013.

On 22 January 2013, respondents filed a motion entitled "MORTGAGORS [sic] MOTION FOR SANCTIONS AND FOR DENIAL OF FORECLOSURE WITH PREJUDICE AND/OR FOR PERMANENT INJUNCTIVE RELIEF FOR FRAUD UPON THE COURT AND MORGAGORS [sic] BY WELLS FARGO BANK, NA." The motion alleged that Wells Fargo had committed fraud upon the court by producing at the 2 January 2013 hearing a copy of the promissory note that had been altered by the addition of Wells

Fargo as an endorsee. Attached to respondents' motion were the affidavits of Shyvonne and Ralph Foster, a copy of the promissory note sent to respondents in response to a July 2012 qualified written request, and a copy of the promissory note submitted by Wells Fargo at the 2 January 2013 hearing.

On 28 January 2013, counsel for Wells Fargo was not present when the case was called before Judge George B. Collins, but appeared later that afternoon and moved for a continuance. On 1 February 2013, Judge Collins entered an order denying Wells Fargo's motion for continuance and dismissing Wells Fargo's appeal "without prejudice." Judge Collins did not hear respondents' motion for sanctions or permanent injunction, and the order did not mention those motions. Respondents filed a written notice of appeal to this Court on 11 February 2013 from the 1 February 2013 order.

On 2 April 2013, after the time had expired for service of a proposed record on appeal, respondents filed a motion for extension of their time to serve the proposed record on appeal. The motion stated:

There remain issues to be resolved in this case regarding mortgagors [sic] motion for sanctions for fraud upon the court and for permanent injunction. If Mortgagors are successful in obtaining the requested relief then no appeal is necessary. On the other hand, if relief is denied, mortgagors would seek to amend the notice of appeal to include

such order and make appropriate additions to their proposed record to avoid a piece meal appeal.

The motion stated that it "was timely filed, however it was inadvertently file [sic] in a related proceeding instead of this proceeding." The motion was originally filed on 14 March 2013 in 12 CVS 6015.

On 25 April 2013, Wells Fargo moved to dismiss respondents' appeal pursuant to Rules 11 and 25 of the Rules of Appellate Procedure. At the hearing on 13 May 2013, Judge Paul G. Gessner rendered a ruling granting Wells Fargo's motion to dismiss, denying respondents' motion for an extension, and denying respondents' motion for sanctions. On 31 May 2013, Judge Gessner entered a written order dismissing respondents' appeal, but the order did not include any ruling on respondents' motion for sanctions.

On 23 May 2013, after Judge Gessner rendered his ruling but before entry of the 31 May 2013 written order, respondents filed a "MOTION TO VACATE ORDER DISMISSING APPEAL AND MOTION TO VACATE, AMEND AND/OR FOR RECONSIDERATION OF THE DENIAL OF RESPONDENTS' MOTION FOR SANCTIONS AND PERMANENT INJUNCTIVE RELIEF" pursuant to Rules 59 and 60 of the Rules of Civil Procedure. This motion was heard on 29 July 2013 by Judge Carl R. Fox, and on 8 August 2013, Judge Fox entered an order denying the motion. Respondents timely appealed to this Court.

Discussion

Respondents argue that Judge Fox erred in denying their motion for Rule 60(b) relief from Judge Gessner's 31 May 2013 order dismissing respondents' appeal of Judge Collins' order. The standard of review of a trial court's ruling on a Rule 60(b) motion is well settled:

[A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion. [A] trial judge's extensive power to afford relief [under Rule 60(b)] is accompanied by a corresponding discretion to deny it, and the only question for our determination . . . is whether the court abused its discretion in denying defendant's motion. A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason.

*McKyer v. McKyer*, 182 N.C. App. 456, 459, 642 S.E.2d 527, 529-30 (2007) (internal citations and quotation marks omitted).

Judge Collins' 1 February 2013 order dismissed Wells Fargo's appeal of the clerk's dismissal of the foreclosure proceeding. Although the order dismissed the appeal "without prejudice," Wells Fargo is barred from appealing the clerk's order by N.C. Gen. Stat. § 45-21.16(d1) (2013) (clerk's order in foreclosure proceeding "may be appealed to the judge of the district or superior court having jurisdiction *at any time within 10 days after said act*" (emphasis added)). Therefore, the 2 January 2013 clerk's order

dismissing the foreclosure petition stands, and the 1 February 2013 order effectively ended the foreclosure proceeding.

It is well settled that "[o]nly a 'party aggrieved' may appeal from an order or judgment of the trial division." *Culton v. Culton*, 327 N.C. 624, 625, 398 S.E.2d 323, 324 (1990) (quoting N.C. Gen. Stat. § 1-271 (1983)), *superseded on other grounds by* N.C. Gen. Stat. § 35A-1102. "An aggrieved party is one whose rights have been directly and injuriously affected by the action of the court." *Id.* Here, the 1 February 2013 order did not injuriously affect respondents -- on the contrary, it ended the foreclosure of respondents' property. Nevertheless, respondents contend that their appeal of the order should not have been dismissed because respondents' motions for permanent injunctive relief and sanctions remained pending in the trial court.

Regarding respondents' motion for permanent injunctive relief, this Court has held that "[a]t a foreclosure hearing pursuant to N.C. Gen. Stat. § 45-21.16, '[t]he Clerk of Superior Court is limited to making the four findings of fact specified in the statute, and it follows that the Superior Court Judge is similarly limited in the hearing *de novo*.'" *Mosler v. Druid Hills Land Co.*, 199 N.C. App. 293, 295-96, 681 S.E.2d 456, 458 (2009) (quoting *In re Watts*, 38 N.C. App. 90, 94, 247 S.E.2d 427, 429 (1978)). "'The proper method for invoking equitable jurisdiction

to enjoin a foreclosure sale is by bringing an action in the Superior Court pursuant to G.S. 45-21.34.'" *Id.* at 296, 681 S.E.2d at 458 (quoting *In re Watts*, 38 N.C. App. at 94, 247 S.E.2d at 429).

Thus, "[o]n a *de novo* appeal to the Superior Court in a section 45-21.16 foreclosure proceeding, the trial court must 'declin[e] to address [any party's] argument for equitable relief, as such an action would . . . exceed[] the superior court's permissible scope of review[.]'" *Id.* (quoting *Espinosa v. Martin*, 135 N.C. App. 305, 311, 520 S.E.2d 108, 112 (1999)). Accordingly, we hold that Judge Collins properly declined to rule on respondents' motion for permanent injunctive relief, as the superior court did not have subject matter jurisdiction to grant that relief in this proceeding.

Thus, the only motion pending after the dismissal of the foreclosure proceeding was respondents' motion for sanctions. This Court has held that "neither the dismissal of a case nor the filing of an appeal deprives the trial court of jurisdiction to hear Rule 11 motions." *Dodd v. Steele*, 114 N.C. App. 632, 634, 442 S.E.2d 363, 365 (1994). Consequently, the 1 February 2013 order dismissing the foreclosure proceeding, and respondents' filing an appeal of that order did not prohibit respondents from calendaring their motion for sanctions with the trial court.

Respondents, therefore, were not aggrieved by the 1 February 2013 order.

"Where a party is not aggrieved by the judicial order entered, . . . his appeal will be dismissed." *Gaskins v. Blount Fertilizer Co.*, 260 N.C. 191, 195, 132 S.E.2d 345, 347 (1963) (per curiam). We therefore hold that Judge Fox properly denied respondents' motion to vacate the order dismissing respondents' appeal. Because of our holding, we need not address the parties' arguments regarding respondents' failure to serve a proposed record on appeal in violation of Rule 11 of the Rules of Appellate Procedure.

Respondents next argue that Judge Fox erred by failing to reconsider respondents' motions for permanent injunctive relief and sanctions. Regarding permanent injunctive relief, as previously discussed, the trial court did not have authority to grant such relief in a foreclosure proceeding pursuant N.C. Gen. Stat. § 45-21.16(d1).

With respect to respondents' motion for sanctions, the record before Judge Fox contained no order dismissing or denying respondents' motion for sanctions. Regardless whether Judge Gessner orally made any ruling on the motion for sanctions, the order actually entered only dismissed respondents' appeal -- it did not address the motion for sanctions. Therefore, no order



existed to be reconsidered, and Judge Fox properly denied respondents' Rule 60 motion.

Affirmed.

Judges BRYANT and CALABRIA concur.